

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MERCEDES, LTD., d/b/a XL CAFÉ BAR,)	
<i>et. al.</i> ,)	
)	
Plaintiffs,)	
)	No. 99 C 8189
vs.)	
)	District Judge Nordberg
CITY OF CHICAGO, a municipal corporation,)	
<i>et. al.</i> ,)	Magistrate Judge Schenkier
)	
Defendants.)	

REPORT AND RECOMMENDATION

On December 16, 1999, plaintiffs filed this action alleging numerous claims under 42 U.S.C. § 1983 and Illinois law against a variety of defendants: (1) six named and fifteen “John Doe” police officers; (2) the City of Chicago and its Mayor and Chief of Police; (3) the Chicago License Commission, and its Director; and (4) the Chicago License Appeal Commission and its Chairman. On June 7, 2000, the City of Chicago and the individual defendants moved to dismiss this complaint for want of prosecution (doc. # 21-1). On June 14, 2000, the District Court referred that motion to this Court for a Report and Recommendation (doc. # 22-1) -- presumably because the precipitating event for the motion was plaintiffs’ violation of an order issued by this Court. For the reasons set forth below, the Court respectfully recommends that plaintiffs’ motion be denied.¹

¹During a hearing on June 15, 2000, the Court offered plaintiffs an opportunity to respond either orally or in writing to the motion. Plaintiffs elected to forego any written response, and instead set forth orally their views as to why the motion should be denied. At that hearing, the Court indicated that it intended to recommend denial of the motion, and explained why it planned to do so. The Court further indicated its intent to issue a written recommendation setting forth its reasoning, which this opinion constitutes.

I.

The complaint alleges that the defendants (with the exception of the License Commission and the License Appeal Commission, which are joined solely for the purposes of injunctive relief) have engaged in an ongoing course of conduct to harass and intimidate them in the operation of their restaurant. Plaintiffs allege illegal search and seizure, excessive force, deprivation of liberty and property by the individual police officers and the City, in violation of Section 1983 (Counts I and II). Plaintiffs also assert supplemental state law claims against various defendants for battery (Count III), false arrest (Count IV), and malicious prosecution (Count V). Plaintiffs seek an award of money damages and injunctive relief.

On December 16, 1999, the same date they filed the complaint, plaintiffs moved for entry of a temporary restraining order and a preliminary injunction (doc. # 17-1), which was referred to this Court (along with all other non-dispositive pretrial matters) for resolution (doc. # 5-1). The defendants responded to the motion by seeking to dismiss plaintiffs' claims for injunctive relief (doc. # 8-1). Pursuant to a briefing schedule set by the Court on January 13, 2000 (doc. # 10-1), and revised at the request of plaintiffs on January 25, 2000 (doc. # 11-1), the motion to dismiss was fully briefed.

On January 25, 2000, while the motion to dismiss was being briefed, this Court directed that decision-makers representing all parties personally meet prior to the next court hearing on February 16, 2000 to determine if a resolution of the case (or at least the preliminary injunction request) was possible (doc. # 11-1). At the February 16, 2000 conference, it became apparent that the City defendants had failed to comply with that order. As a result, the Court reissued its directive that decision-makers representing the parties meet promptly to attempt to resolve as many of the disputes as possible (doc. # 14-1).

At a hearing on March 1, 2000, the parties reported that the meeting ordered by the Court had occurred, and that as a result of that meeting, plaintiffs were withdrawing their request for a temporary restraining order and preliminary injunction (doc. # 16-1). Plaintiffs made it clear, however, that they were only abandoning the motion, and not the case as a whole. Therefore, at the March 1 hearing, the Court ordered that defendants respond to the complaint by April 10, and the parties submit a proposal to the Court for pretrial scheduling in the case by April 21. The Court set the matter for a status conference on April 25 (doc. # 16-1).

The defendants did not submit their responses to the complaint when due on April 10, 2000. However, the parties worked together to jointly submit on April 21, 2000 a proposed schedule for pretrial proceedings. In explaining that proposal during the court appearance on April 25, 2000, the parties stated that they had discussed the numerous challenges that defendants planned to make to the complaint, and plaintiffs' desire to amend the complaint to address at least certain of those concerns in order to narrow the need for motion practice. As a result, the Court ordered the parties to meet and confer on April 25, 2000 about the alleged defects in the complaint, and the plaintiffs to file any amended complaint by May 2, 2000. The Court then set a comprehensive pretrial schedule based on that date for the amended complaint: defendants were to answer or move to dismiss the complaint by May 9, 2000; plaintiffs were to seek leave to add any additional parties by June 15, 2000; written discovery was to be completed by August 15, 2000; non-expert fact depositions were to be completed by November 30, 2000; and expert discovery then was to take place, and to be completed by February 18, 2001.

As defendants' current motion to dismiss relates, plaintiffs did not file an amended complaint on May 2, 2000 or seek leave to extend the time in which to do so. Defendants state that in the following

month, they called plaintiffs' counsel more than a dozen times to find out why the amended complaint had not been filed. According to defendants, they reached plaintiffs' counsel on one occasion, on or about May 25, 2000, and were told that an amended complaint would be forthcoming "any day" (Def.'s Motion, ¶ 6). However, no amended complaint was filed prior to the time defendants' filed their current motion to dismiss.

During the hearing on June 15, 2000, plaintiffs' counsel appeared and indicated that, notwithstanding the disregard of the Court's April 25, 2000 order and the lack of responsiveness to defendants' telephone inquiries, plaintiffs indeed remain very interested in prosecuting their claims in this case. The sole explanation that plaintiffs' attorneys offered for their failure to file the amended complaint was the press of intervening events, which largely consisted of continuing disputes about defendants' alleged misconduct and interference with plaintiffs' attempts to run their business. Plaintiffs offered no explanation or excuse for their failure to bring any of these matters to the Court's attention earlier, or to seek an adjustment in the schedule to account for those intervening events.

II.

"Dismissal for failure to prosecute is an extraordinarily harsh sanction," *Dunthy v. McKee*, 134 F.3d 1297, 1299 (7th Cir. 1998) (*quoting In Re Bluestein & Co.*, 68 F.3d 1022, 1025 (7th Cir. 1995) -- indeed, it is the death knell of a plaintiffs' case. Because dismissal for failure to prosecute is such an extreme sanction, it should be used "only in extreme situations, where there is a clear record of delay or contumacious conduct, or whenever less drastic sanctions have proven unavailable." *Id.*

In determining whether to impose the sanction of dismissal, the Court must take "full and careful account of the frequency and magnitude of the plaintiff's failure to comply with the deadlines for the

prosecution of the suit,” *Kruger v. Apfel*, No. 98-4913, 2000 WL 562894, at *3 (7th Cir., May 10, 2000) (*quoting Ball v. City of Chicago*, 2 F.3d 752, 759-60 (7th Cir. 1993)). The Court must “consider the egregiousness of the conduct in question in relation to all aspects of the judicial process.” *Id.* (*quoting Barnhill v. United States*, 11 F.3d 1360, 1367-68 (7th Cir. 1993)). Moreover, the sanction of dismissal should not be imposed without there being “due warning” that this sanction might occur: “There should be an explicit warning in every case.” *Id.* (*quoting Ball*, 2 F.3d at 755). The imposition of dismissal for want of prosecution without the requisite warning is an abuse of discretion. *Id.* (vacating a dismissal for want of prosecution where there was no “due warning,” and where the plaintiffs’ “one missed deadline fails to rise to the level of long-standing or contumacious conduct warranting dismissal”).

The Court believes that these governing principles make it abundantly clear that dismissal for want of prosecution is not appropriate in this case. *First*, there was no prior warning given to plaintiffs’ counsel that the failure to comply with the deadlines set forth in the April 25, 2000 scheduling order -- or, for that matter, any other deadlines -- might result in the “extraordinarily harsh sanction” of dismissal. *Second*, the reason that there was no warning is because the Court had found no reason to believe that plaintiffs would not comply with these deadlines: there was no history here of missed deadlines or other disregard by the plaintiffs of the Court’s directives. Rather, in the past it had been the defendants who had not fully complied with an order issued by the Court: the January 25, 2000 order requiring that defendants’ decision-makers participate personally with plaintiffs’ decision-makers in a conference to attempt to resolve certain disputes. *Third*, although defendants claim that they are “extremely prejudiced” by the failure to timely file the amended complaint, the Court disagrees. This lawsuit is still in its nascent stages, and the delay occasioned

by plaintiffs' conduct will not substantially postpone the completion of discovery or the ultimate disposition of the case.²

The Court's comments should not be interpreted as an acceptance of plaintiffs' explanations as a justifiable excuse for their conduct. It should be obvious that there are a number of appropriate ways of dealing with a circumstance where intervening events may make a previously set schedule unworkable, with the most evident one being to seek leave of the Court to adjust the schedule. It should be equally obvious that ignoring a Court Order *is not* the way to deal with the situation. None of the plaintiffs' explanations provide any good reason for their failure, at a minimum, to come to the Court and ask for relief from the schedule established on April 25, 2000.

Courts have the power, and the responsibility, to advance the "orderly and expeditious disposition of cases." *Lengthy Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962). When a party flouts a court's authority to do so, a court also has the power to dismiss the action. *Spain v. Board of Education of Meridian Community Unit School Dist. 101*, 98-2950, 98-3260, slip. op. at 7 (7th Cir., June 6, 2000). However, plaintiffs' failure here does not reflect a pattern of their lack or

²Under the schedule set by the Court on April 25, 2000, all discovery was due to be completed by February 18, 2001. On June 15, 2000, the Court -- in light of the plaintiffs' failure to timely file an amended complaint -- adjusted this schedule, with the result being that all discovery is now due to be completed by April 6, 2001 (doc. # 23-1). Defendants have offered no reason why they would be prejudiced by this adjustment of less than two months in the discovery schedule. As was the case in *Kruger*, this Court finds that this short delay does not "seem of much consequence" in this lawsuit. 2000 WL 562804, at *3.

disregard for the Court's orders; the Court views it as an isolated incident that does not warrant the "extraordinarily harsh sanction" of dismissal.³

CONCLUSION

For the foregoing reasons, the Court respectfully recommends that defendants' Motion to Dismiss for Failure to Prosecute (doc. # 21-1) be denied. Specific written objections to this report and recommendation may be served and filed within 10 business days from the date that this order is served. Fed. R. Civ. P. 72(a). Failure to file objections with the district court within the specified time will result in a waiver of the right to appeal all findings, factual and legal, made by this Court in the report and recommendation. *See Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538, 539 (7th Cir. 1986).

ENTER:

SIDNEY I. SCHENKIER
United States Magistrate Judge

Dated: June 23, 2000

³During the hearing on June 15, 2000, the Court indicated that it intended to recommend against dismissal, but to recommend imposition of a monetary fine. On further reflection and review of the history of this case, the Court has reconsidered that comment and elects not to recommend a monetary fine. As the Court has indicated earlier in this recommendation, defendants in this case have not been perfect in their adherence to Court orders, and the Court has not found it appropriate to sanction them. However, this recommendation should serve as a warning to all parties that any failure to follow Court orders in the future will not be tolerated, and will be treated sternly.